93-474

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Widow-Petitioner,

vs.

MAHER TERMINALS, INC.,

Employer-Respondent,

– and –

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PHILIP J. ROONEY
Counsel of Record
ISRAEL, ADLER, RONCA
& GUCCIARDO
Attorney for Petitioner
160 Broadway
New York, New York 10038
(212) 227-1350

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err as a matter of law in holding that the Administrative Procedure Act, 5 U.S.C. 501 *et seq.* (hereinafter APA) mandates an evidentiary standard of preponderance of the evidence in cases arising under the Longshore and Harbor Workers' Compensation Act (hereinafter LHWC), 33 U.S.C. 901, *et seq.*, as well as other administrative proceedings.

2. Did the Court of Appeals err, as a matter of law in digressing from a line of cases holding that in the case of evidentiary deadlock the "true doubt" rule may be utilized by the fact-finder to resolve the relevant issue in favor of the injured employee and his family?

3. Did the Court of Appeals exceed its authority to review cases arising under the LHWC in reversing a decision clearly supported by substantial evidence in the record as a whole on the basis that the evidence was allegedly in equipoise?

4. Is the interpretation of the office of Director of Office of Workers' Compensation Programs, U.S. Department of Labor, of the LHWC entitled to a deference by the reviewing Court.[1]

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[1] The widow-petitioner mentions this point as it was raised below but it believes it appropriate for the Solicitor to comment upon same. The point will not be discussed herein.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The trial of this matter eventuated in a decision of Aaron Silverman, an Administrative Law Judge of the U.S. Department of Labor, dated November 22, 1988, and a decision and order denying reconsideration dated December 15, 1988. This decision was affirmed by the Benefits Review Board, U.S.

Department of Labor, in an unpublished decision dated March 27, 1992. The U.S. Court of Appeals for the Third Circuit reversed the decision of the Benefits Review Board and remanded the case for further consideration, 992 F.2d 1277 (3rd Cir. 1993). Petitions for re-hearing submitted by the widow-claimant and Director of Office of Workers' Compensation Programs were denied in a decision filed June 25, 1993, ____ F.2d ____ (3rd Cir. 1993).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was dated April 19, 1993 and Petition for re-hearing denied in an order filed on June 25, 1993. Said decision reviewed an order of the Benefits Review Board pursuant to 33 U.S.C. 921(c) (Longshore and Harbor Workers' Compensation Act). Jurisdiction of this Court is invoked pursuant to Section 28 U.S.C. 1254(1).

RELEVANT STATUTES

5 U.S.C. 556(d) Administrative Procedure Act (in relevant part):

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repretitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

33 U.S.C. 919(d) Longshore and Harbor Workers' Compensation Act:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of Section 554 of title

5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities, vested by this Act, on the date of enactment of the Longshoremen's and Harbr Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearing shall be vested in such hearing examiners.

STATEMENT OF THE CASE

These proceedings commenced with the filing of claims for benefits for the disability of Michael Santoro arising out of an accident on July 23, 1985 and benefits for death on March 11, 1986 by his widow, Pasqualina, pursuant to the LHWC, 33 U.S.C. 908(c) 909(b)(d). The employer, Maher Terminals, conceded responsibility for the injury to the neck and paid compensation benefits for a period of disability but disputed the claim for benefits for death which was caused by a malignancy in the spine claimed to have been aggravated by the trauma.

The matter duly appeared for formal hearing before an Administrative Law Judge, Aaron Silverman, pursuant to 33 U.S.C. 919(d). Testimony was taken of Michael's widow who described a consistent progression of symptoms subsequent to the injury. Testimony was also taken of Dr. David Yazden, the deceased's attending physician, who stated that the injury caused swelling at the site of a pre-existing, asymptomatic malignancy, causing quadraphlegia and death. The employer's consultant, Dr. Benett Derby (who had never examined the deceased during his lifetime) testified that the employee's death was solely due to the malignancy which coincidently became symptomatic after the injury.

The Administrative Law Judge, after a meticulous review of the record, determined that the issue of causality was still debatable but concluded, in light of the unbroken history of neck pain, that acceptance to the employer's position that the escalation of symptoms and the accident's being purely fortuitous, in light of the record as a whole, would be inconsistent

with the purposes and policy of the Act and resolved the doubt in favor of the claimant. The Employer's request for reconsideration was denied.

The decision was affirmed by the Benefits Review Board on the basis that the decision was supported by substantial evidence and that the administrative law judge (hereinafter ALJ) utilized the proper legal standard in utilizing the "true doubt" rule.

Maher thereupon submitted a petition for review to United States Court of the Appeals for the Third Circuit urging the same issues as before the Board: that the widow has failed to prove her case by a preponderance of the evidence.

Contemperaneous with this case there was argued the case of *Greenwich Collieries v. Ondecko and Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993), a case arising under the Black Lung Benefit Act, 30 U.S.C. 901 *et seq.* in which the "true doubt" rule was likewise utilized and in which the employer argued, as herein, that a preponderance of the evidence standard was mandated.

The lower court's reasoning in both decisions was nearly identical: that the Administrative Procedural Act mandated, in all cases subject to that Act, a legal standard of preponderance of the evidence. In the instant case, the Court did not discuss whether the decision was supported by substantial evidence. The Director, Office of Workers' Compensation Programs, had also argued that the Director's interpretation of the statute was entitled to special deference and the Director accepted the "true doubt" rule as being valid. This argument was not addressed by the Court. Petitions for re-hearing submitted by the widow and Director were denied by the Court.

Interestingly, the Seventh Circuit, within this time frame, heard a case whose facts were nearly on all fours with that of *Greenwich Collieries* and in which the "true doubt" rule was in issue and ruled in direct contradiction to the Third Circuit, that the "true doubt" rule was applicable and that the APA does not mandate a standard of preponderance of the evidence, *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993).

REASONS FOR GRANTING THE WRIT

It is submitted that this Court should exercise its discretion and grant a review on Writ of Certiorari for the following reasons:

1. The Third Circuit's holding that the "true doubt" rule is inapplicable in cases arising under the LHWC is in conflict with a line of decisions in the First, Second, Fifth, Seventh, Ninth and D.C. Circuits. This Court has not specifically addressed the issue of statutory policy and its resolution is of importance to administration of the Act.

2. The Third Circuit's holding that 556(d) (Section 7(c)) of the Administrative Procedure Act mandates a legal standard of preponderance of the evidence on all cases tried under that Act is an issue of controlling importance in the Federal administrative system, has a direct bearing on rule making and discretionary rule making authority of certain Federal agencies and is in direct conflict with a holding of the Seventh Circuit.

3. There is a conflict between the Third and Seventh Circuit as to the interpretation of this Court's holdings in cases of *Steadman v. SEC*, 450 U.S. 91 (1981) and *NLRB v. Transportation Management*, 462 U.S. 893 (1983), interpreting the Administrative Procedure Act. The Seventh Circuit, in fact, suggested that it would be appropriate for this Court to resolve this claimed conflict, *Freemen United Coal Mining Co. v. Director, OWCP*, cited above, decision on petition for re-hearing *en banc*, ____ F.2d ____ (7th Cir. 1993).

ARGUMENT

The decision of the Third Circuit, if permitted to stand, would impose a retrogressive interpretation on the Longshore Act. It would impose a rigid, mechanistic legal standard on much of the Federal administrative system and severely limit the authority of various Federal agencies to regulate administrative proceedings. It would erode the substantial evidence standard of review of certain Federal administrative bodies.

The standard of review, both of the Benefits Review Board and the several circuit courts, is limited to a determination as to whether the decision of the ALJ is supported by substantial evidence in the record as a whole, *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968). Substantial evidence, in turn, is "more than a mere scintilla" or evidence that a "reasonable mind might accept as adequate to support a conclusion", *Universal Camera Corporation v. NLRB*, 340 U.S. 474, 477 (1951).

The issue presented for resolution by the ALJ was wholly factual in nature. It is equally clear that his decision is supported by substantial evidence in the record as a whole since it is based on the uncontradicted testimony of the widow and of Dr. Yazden, the employee's attending physician. Yet the Third Circuit's decision is wholly devoid of any consideration whether the decision is supported by substantial evidence in the record as a whole, which it clearly is. Concededly, the courts have both the authority and responsibility to determine legal issues and legal standards but the lower court exceeded its authority by interfering in the method of fact finding of the ALJ.

While the ALJ carefully weighed the evidence, he also concluded that the ultimate factual determination was not without doubt and resolved that doubt in favor of the employee and his widow. In so doing he followed a long line of cases holding that doubtful factual issues should be resolved in favor of the injured employee and his family, the so called "true doubt" rule, *Fidelity & Casualty Co. v. Burris*, 59 F.2d 104 (D.C. Cir. 1932); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990); *Parsons*

Corporation of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978); *F.H. McGraw v. Long*, 145 F.2d 886 (2nd Cir. 1944); *Stratchen Shipyards v. Shea*, 406 F.2d 521 (5th Cir. 1969); *Freemen United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993). This line of cases holds that the compensation claimant's burden of proof under the Act is less stringent than in other civil cases. The rule, in turn, is based on the principle that the Act's liberal and humanitarium purposes require an interpretation in favor of its beneficiary, the injured employee and his family, *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 406 (1932); *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952).

This "true doubt" rule must be seen as a component of the substantial evidence rule (as well as the authority of the individual agency courts to allocate the burden of persuasion) i.e. the administrative decision must be upheld by the court even if the resolution of the ultimate factual determination is debatable. It is not an affirmative rule of evidence or procedure but is a deadlock breaking device that is within the discretion of the fact-finder and, for example, cannot be utilized to overturn a decision adverse to the claimant, *Sprague v. Director, OWCP*, 688 F.2d 866 (1st Cir. 1982). The Court below never discussed the propriety of the "true doubt" rule and went so far as to suggest that the principle of liberal interpretation of the Act is adequately served by the limited presumptions of Section 920 of the Act, another novel proposition. Rather, the Third Circuit disregarded the above line of cases and held that the "true doubt" rule contravenes Section 7c of the APA, 5 U.S.C. 556(d). This section was interpreted as mandating a standard of preponderance of the evidence in all cases tried under that Act, absent express statutory exception.

It is impossible to reconcile that conclusion with this Court's specfific holding that the term "burden of proof" in Section 7c determines only the burden of going forward with evidence, not the burden or persuasion, *NLRB v. Transportation Management*, 462 U.S. 393 (1983). That case further affirmed the authority

of the individual agency to determine the burden of proof, an authority extended also to the court's, absent agency or Congressional action, *Woodley v. INS*, 386 U.S. 276 (1966).

The circuit courts had previously likewise held that the APA was not intended to disturb the traditional allocation of the burden of proof, *e.g. Bosma v. U.S. Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. E.P.A.*, 584 F.2d 498 (D.C. Cir. 1976) *cert. denied sub nom. Velsicol Chemical Corporation v. E.P.A.*, 431 U.S. 925 (1977), quoted with approval in *NLRB Transportation Management*, cited above, Footnote 1, 403-404.

The court below endeavored to distinguish *Transportation Management* by asserting that in that case the burden of proof had been shifted only with respect to an affirmative defense, ignoring that the case also stated that the agency itself had the authority to shift the burden of proof.

The court below, in effect, attempted to overrule *Transportation Management*, by asserting that the controlling case was *Steadman v. SEC*, 450 U.S. 91 (1981). In that case, the agency itself had established a standard of preponderance of the evidence and the Third Circuit relied on dicta contained in a footnote in that case.

The Third Circuit endeavored to reconcile the two cases by asserting that *Transportation Management* was interpreting the first sentence of Section 7c of the APA and *Steadman* the third sentence. This is a labored interpretation as it is the first sentence that contains the phrase "burden or proof" (which this Court has defined as going forward with evidence, not ultimate burden of persuasion) and the requirement of legislative exception. The third sentence of Section 7c, upon which the lower court relied, contains no such language.

The lower court's adoption of identical reasoning in the companion case of *Greenwich Colleries v. Director, OWCP*, cited above, a case arising under the Black Lung Act, as well as breadth of the court's language suggests that the court is holding that

in any and all cases tried under the APA, absent specific legislation, a legal standard of preponderance of the evidence is applicable.

The Seventh Circuit was presented with the identical issue in a case nearly on all fours with *Greenwich Colleries* and arrived at precisely the opposite conclusion, *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, cited above. That court adhered to this Court's holding in Transportation Management and specifically upheld the validity of the "true doubt" rule. That court, in considering the petition for re-hearing, suggested that this court should reconcile any claimed conflict between Transportation Management and Steadman, *Freemen United Coal Mining Co. v. Office of Workers' Compensation Programs*, Decision on petition for rehearing, ____ F.2d ____ (3rd Cir. 1993).

The instant case is distinguishable from *Greenwich Colleries*, cited above, and *Freeman*, cited above, as these cases arose under the Black Lung Act, involving the interpretation of certain presumptions at 20 CFR 727.203(a) and this court's holding in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 1359 (1987). Those regulations and this court's holding in *Mullins* affirmed the power of the individual agency and courts respectively, to allocate this burden of proof independently of the APA.

But the common element in all these cases is the question of the validity of the "true doubt" rule, historically arising under the Longshore Act and recognized as a given by congress in enacting the Black Lung Act, S.Rep No. 743, 92nd Congress, Second Session. (1972).

Congress, in placing adjudication of Longshore cases (as well as Black Lung) cases under the APA intended no substantive change in the respective acts but the elimination of any conflict of interest in the Director's being both administrator and adjudicator of cases, S.R. 92-11250, H.R. 92-1441, 92nd Cong, 1972.

The underlying difficulty with the Third Circuit's overly broad interpretation of the APA is that it would virtually

eliminate the discretionary authority of the individual agency and the courts, based upon sometimes delicate policy considerations, to allocate the burden of persuasion between the parties. As applied to cases under the Longshore Act, the holding would vatiate the principle of liberal interpretation that has been a hallmark of interpretation of the Act since its inception and frustrate the statutory purpose of rapid, inexpensive, adjudication of the rights of the injured employee and his family.

CONCLUSION

WHEREFORE, Petitioner respectfully prays the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to reverse the decision of said court and reinstate the decision of the Benefits Review Board.

Dated: New York, New York
September 21, 1993

PHILIP J. ROONEY
ISRAEL, ADLER, RONCA
& GUCCIARDO
Attorneys for Petitioner
Pasqualina Santoro
160 Broadway
New York, New York 10038
(212) 227-1350

APPENDIX

Filed April 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3222

MAHER TERMINALS, INC.,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent

PASQUALINA SANTORO,

Respondent

On Petition for Review
of an Order of the Benefits Review Board,
United States Department of Labor

B.R.B. No. 89-443

Argued January 12, 1993

Before: HUTCHINSON, SCIRICA, and ROSENN,
Circuit Judges

Opinion Filed April 19, 1993

JOSEPH T. STEARNS, ESQ. (Argued)
Kenny & Stearns
26 Broadway - 27th Floor
New York, New York 10004
Attorney for Petitioner

PHILIP J. ROONEY, ESQ. (Argued)
Israel, Adler, Ronca, & Gucciardo
160 Broadway
New York, New York 10038-4286
Attorney for Widow-Respondent

MARSHALL J. BREGER, SOLICITOR
CAROL A. DE DEO, ASSOCIATE SOLICITOR
JANET R. DUNLOP, COUNSEL FOR LONGSHORE
MICHAEL S. HERTZIG, ATTORNEY
U.S. Department of Labor
Office of the Solicitor
Suite S-4325
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attorneys for Director, OWCP

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

We recently had before us the question of whether the "true doubt" rule could be properly applied in the resolution of a claim for benefits under the Black Lung Benefits Act. We concluded it could not. *Greenwich Collieries v. Director, OWCP*, No. 92-3270 (3d Cir. Mar. 23, 1993). This petition for review of a decision of the Director, Office of Workers' Compensation Programs, raises a comparable question relating to the claimant's burden of proof in cases involving the Longshore and Harbor Workers' Compensation Act (Act), as amended, 30 U.S.C. §§ 901-45 (1982). The ALJ in the present case used the true doubt rule, which calls for the resolution of all true doubts in favor of the claimant, to award benefits to the claimant under the Act despite evidentiary equipoise. The issue in this case is whether the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.* (1992) (APA), prohibits the application of the true doubt rule in cases involving the Act.

This proceeding originated when Pasqualina Santoro (Mrs. Santoro), the widow of the late Michael Santoro

(Decedent), filed a claim under section 9 of the Act against Maher Terminals, Inc. (Maher), for temporary total disability benefits due the decedent during his lifetime and death benefits on account of his injury and death. *See* 33 U.S.C. §§ 908(b), 909.

Following a hearing, at which the parties vigorously contested whether the disability and death were work-related, the Administrative Law Judge (ALJ) found the evidence on the question evenly balanced and resolved his doubts in favor of the claimant. He awarded benefits and denied a motion for reconsideration. The petitioner, Maher, appealed to the Benefits Review Board (Board) of the United States Department of Labor, which sustained the ALJ in an unpublished decision. It then timely appealed to this court. We vacate the Board's order and remand the case for further consideration consistent with this opinion.[1]

I. FACTS

Because this appeal turns on an interpretation of a narrow question of law, i.e., whether the true doubt rule, as utilized in this case under the Act, contravenes the APA, there is no need to embark on a rendition of the voluminous medical and factual details which are involved in this litigation. We recite only those facts necessary to gain insight into the underlying issues of this appeal.

On July 23, 1985, the decedent, who was then 62 years old, reported an accidental injury while employed by Maher at Port Elizabeth, New Jersey. The claimant testified that on that day, the decedent was driving a vehicle off of a ship at Maher's port. Then, in order to avoid a shackle that was swinging towards him, the decedent threw his body to the right and jerked the back of his neck.

The next day, the decedent visited Dr. Visconti, who diagnosed the injury as a strain of the right and left trapezius muscles. The doctor released the decedent to return to work on July 31, 1985. The decedent returned to

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1. This Court exercises jurisdiction over a final order of the Board for an injury which occurred within this Circuit pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c).

work on August 1 for four hours in the employ of International Terminal Operating Company, and on August 2 for one full day in the employ of Maersk Container Service Company. On August 3, the decedent and his wife began a long-scheduled vacation to the New Jersey Shore, which Dr. Visconti had approved.

During his vacation, the decedent began to experience numbness in the fingers of his left hand, as well as continuing shoulder and neck pain, prompting him to visit Dr. Greifinger, an orthopedic surgeon. Dr. Greifinger reported a diagnosis of cervical strain on a preexisting spondylosis.

The decedent continued his vacation, but called Dr. Visconti on August 14 concerning increased neck and shoulder pain, as well as a new pain in the left arm. Dr. Visconti advised him to go to the hospital for a heart examination, which the decedent did. Finding nothing wrong with his heart, the doctors at the hospital released the decedent, counseling him to wear a neck brace and to take medication. His wife testified that the next day her husband was unable to get out of bed because of numbness in his left arm. Thereupon, he was admitted to a hospital at Point Pleasant, New Jersey.

At the hospital, Dr. Weinstein, following a physical examination and myelogram, diagnosed the patient's condition as a cervical thoracic root avulsion and cervical thoracic myelopathy, and he recommended further testing. On August 18, 1985, Dr. David Yazdan, a neurosurgeon, examined the decedent, and Dr. Yazdan suspected a possible intramedullary tumor or a cystic formation within the spinal cord and recommended immediate surgery. Upon operating on the decedent the next day, Dr. Yazdan found a tumor on the spinal cord, which he identified as an astrocytoma. Subsequently, Santoro was transferred to the Veterans Administration Hospital at Orange, New Jersey, where he died in March 1986.

II. STATUTORY BACKGROUND

Our review of questions of legal interpretation is plenary. *See e.g., Carozza v. United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

In bringing a claim pursuant to the Act, the claimant bears the initial burden of production, i.e., to establish a *prima facie* case that he suffered an injury and that employment conditions were sufficient to cause the injury. A failure to carry this initial burden defeats the claim. If the claimant establishes a *prima facie* case, then he or she is entitled to a rebuttable presumption under the Act that the injury was work-related and thus compensable. If the employer successfully rebuts the presumption, the factfinder must resolve the factual dispute on the basis of the evidence as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935).

The problems in many cases, as in this proceeding, is that the factfinder finds the evidence so close that he or she is beset by grave doubt as to the critical issue. Some courts have held that, when considering the evidence on the record as a whole, the judge may resort to the true doubt rule:

> [The factfinder] operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee because the intent of the statute is to place the burden of possible error on those best able to bear it." *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). *In effect, the statute eases the ordinary preponderance of the evidence standard applicable in most civil suits. Id.*

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990) (emphasis added); *see also Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932) ("Where there is doubt, it should be resolved in favor of the injured employee or his dependent family."); *Parsons Corp. of Cal. v. Director, OWCP, United States Dep't of Labor*, 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978); *Freeman United Coal Mining Co. v. OWCP*, 1992 U.S. App. LEXIS 4093 (7th Cir. Mar. 4, 1993).

The genesis of the true doubt rule may be found in *Burris*, 59 F.2d at 1044:

> The underlying purpose of all compensation laws is to provide money indemnity in case of injury where there

> is no assignable fault. Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owing by society to an injured employee to secure him protection, and this the act seeks to accomplish through the means of insurance built up by premiums paid by employers. Where there is doubt it should be resolved in favor of the injured employee or his dependent family.

The court in *Burris* offered no analytical basis for the true doubt rule. The court properly noted that the compensation laws have their root in society's recognition of a duty to protect injured employees, but the court's leap to the conclusion that this justifies the abandonment or alteration of the claimant's burden of persuasion has no logical basis in the law. Nonetheless, the true doubt rule has become a convenient tool for some courts and administrative agencies to allocate the ultimate burden of persuasion, i.e., to allocate the risk of non-persuasion, to the employer on the theory that he is the party best able to bear that risk.

In the instant case, the ALJ's opinion explained his finding that Mrs. Santoro had established a *prima facie* case and, further, that Maher had successfully rebutted the section 920(a) presumption. As a result, the precedent in *Bowers* mandates that the ALJ evaluate all of the evidence on the record, without regard to the statutory presumption:

> Once the employer has carried his burden by offering testimony sufficient to justify a finding [that the death was not work-related], the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

Del Vecchio, 296 U.S. at 286.

Contrary to Maher's assertions, the ALJ adhered to *Bowers* precisely, stating:

> Therefore, the Employer having indicated another cause for, and having severed the possible connection between the claimant's total disability and death, the

> presumption is deemed overcome and the case is decided on the basis of the record as a whole.[2]

In evaluating the evidence on the record as a whole, however, the ALJ ultimately did apply the true doubt rule. He found that the evidence was in equipoise and then summarily resolved the doubt in favor of the claimant:

> In view of this record, acceptance of the employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

III. DISCUSSION

Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), requires that any hearing under the Act be conducted in accordance with the provisions of 5 U.S.C. section 554 of the APA. In *Greenwich Collieries*, we held that the true doubt rule was inconsistent with the APA in cases involving the Black Lung Benefits Act.

Addressing the claimant's ultimate burden of persuasion under the Act involved in the case *sub judice*, the first sentence of section 7(c) of the APA provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

5 U.S.C. § 556(d).

The third sentence of that section continues:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

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2. Maher argues extensively about the merits of the presumption and its use as affirmative evidence in its brief. Because the ALJ did not actually make use of the presumption in this case, there is no need to address these arguments.

Id.

The language of the statute, therefore, informs us that, unless superseded by statute, the APA requires that the claimant bear the burden of proof.[3] It is unfortunate that the etymology of the phrase "burden of proof" has so developed that it can be used to mean solely the burden of persuasion, solely the burden of producing evidence, or both. *Greenwich Collieries*, slip op. at 10.

As we observed in *Greenwich Collieries*, some of the confusion surrounding the phrase "burden of proof" has been addressed by the Supreme Court. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the employer asserted that the General Counsel, as the proponent of an order that the employer had committed unfair labor practices, must bear the burden of proof under section 7(c) of the APA. The General Counsel did not dispute that it bore the burden of persuasion with respect to the *prima facie* case regarding unfair labor practices, but it asserted that it should not shoulder the burden of persuasion regarding an affirmative defense that was available to the employer. The Supreme Court stated, in *dicta*, that "[s]ection 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Transportation Management*, 462 U.S. at 403 n.7.

Two years earlier, the Supreme Court stated, "The language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." *Steadman v. SEC*, 450 U.S. 91, 98, 102 (1981). Therefore, *Steadman*, in conjunction with section 7(c), teaches that

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3. Section 12 of the APA allows for the APA's authority to be superseded by express provisions in statutes. This means that an express statutory provision, such as the section 920 presumption in the Act, would override the rules set forth in the APA. However, none of the following amount to *express statutory* provisions having the authority to supersede the APA on the issue of the degree of evidence which will satisfy the burden of persuasion: the legislative history to the Act, which enunciates its humanitarian and remedial purpose, longstanding use of the true doubt rule by the Board, judicial acceptance of the rule, or Congressional inaction.

the third sentence of section 7(c) means that a sanction may not be imposed or rule or order issued unless the proponent of the sanction, rule, or order proves his or her case by a preponderance of the evidence.

Facially, *Steadman* and *Transportation Management* may appear irreconcilable. However, there are two reasons why our decision today holds that the third sentence of section 7(c) places the burden of persuasion upon the claimant, rendering our decision today consistent with both Supreme Court precedents.

First, in *Transportation Management*, only the first sentence of section 7(c) was at issue, and therefore the Court did not consider the meaning of the third sentence of that section. In that case, the respondent argued that the first sentence of section 7(c), which states that the proponent of an order shall have the burden of proof, means that the claimant bears the burden of persuasion. The Court disagreed, stating:

> Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof. . . . Section 7(c), however, determines only the burden of going forward, not the burden of persuasion.

Transportation Management, 462 U.S. at 404 n.7.

Although the Court appears to have expansively stated that section 7(c) as a whole applies merely to the burden of production, the Court's interpretation of the substance of section 7(c), albeit in a footnote and in *dicta*, was limited to the first sentence. *See id.* ("Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof.") Thus the Court's own language, which it quoted from the first sentence of section 7(c), evinces that the only portion of section 7(c) with which it was grappling was the first sentence. This analysis is supported by the absence of any reference by the Court in *Transportation Management* to its decision in *Steadman*.

Moreover, in *Environmental Defense Fund, Inc. v. E.P.A.*, 548 F.2d 998, 1004, 1013-1015 (1976), *cert. denied sub nom. Velsicol Chem. Corp. v. E.P.A.*, 431 U.S. 925 (1977), upon which the *Transportation Management* Court relied in

reaching its conclusion regarding section 7(c), the court dealt only with the first sentence of section 7(c). There, the court announced that although the APA stated that "except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof," *Id.* at 1004, "the 'burden of proof' [the APA] casts upon the 'proponent' is the burden of coming forward with proof, not the ultimate burden of persuasion." *Id.* at 1013. Therefore, the Supreme Court's *dicta* stating that section 7(c) is limited to the burden of production was an analysis only of the first sentence of that section.

In contrast, in the *Steadman* case the Court specifically addressed the third sentence of section 7(c). The Court there stated that third sentence of section 7(c) means that the standard of proof necessary to carry the burden of persuasion under the APA is the preponderance of the evidence standard. Therefore, *Steadman*, standing alone, does not allocate the burden of proof, but rather defines its scope as a preponderance of the evidence. It may be suggested that the APA goes no further than this and fails to allocate the burden of persuasion, which gives each administrative agency the discretion to do so without contravening the APA, provided that the party to whom it allocates the burden proves its case by a preponderance of the evidence.

The APA, however, does indeed allocate the burden of persuasion. The language of the APA, coupled with that of *Steadman*, teaches that a sanction may not be imposed or rule or order issued except on a preponderance of the evidence. It is typically the claimant who strives to have a rule or order issued, and the APA prohibits such an issuance unless the proponent of that rule or order proves his case by a preponderance of the evidence. Therefore, it is usually the claimant who bears the burden of proving his case by a preponderance of the evidence.

For example, in the case *sub judice*, Mrs. Santoro seeks to have an order issued that she is entitled to benefits under the Act. She seeks to change the status quo. Hence it is she who bears the burden of proving entitlement to benefits by a preponderance of the evidence. Thus, *Steadman*, and not *Transportation Management*, deals with

the third sentence of section 7(c), and the former is therefore the more relevant precedent for our purposes today.

We find support for our analysis in the legislative history of section 7(c), which states in part:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence.

H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946). The first sentence above is relied upon to show that the first sentence of section 7(c), which likewise discusses "the burden of proof," refers only to the burden of production, a proposition not presently in dispute. The second sentence above echoes the language of the third sentence of the statute, which has been interpreted as establishing the standard of proof for the burden of persuasion under the APA, i.e., a preponderance of the evidence. *Steadman*, 450 U.S. at 97-102. The *Steadman* Court's analysis of the statute and its legislative history directly links the statutory requirement that no order shall issue unless "supported by and in accordance with . . . substantial evidence" under the preponderance standard.

If no order shall issue except supported by and in accordance with a preponderance of the evidence, the inevitable conclusion is that the proponent of that order must bear the burden of persuasion by a preponderance of the evidence. We concede that the legislative history previously cited, taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence. In practice, however, it is difficult to imagine how this could lead to an interpretation of section 7(c) that allocates the burden of persuasion *solely* on the

party who contests the grant of relief. If this is done, and the party contesting the claim for relief does not sustain his or her burden of persuasion because the evidence is found to be in equipoise, an order in favor of the claimant will issue that is not supported by a preponderance of the evidence, a result in clear contravention of the APA.

Nor is it possible for adversarial parties to bear the same burden at the same time on the same issue or issues. The only interpretation of the third sentence of section 7(c), in conjunction with its legislative history, that does not of itself contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted to the party opposing the grant of relief as to issues raised by the opponent, i.e., affirmative defenses. *See generally Transportation Management.*

A further reading of the legislative history reinforces this view:

> The first and [third] sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a *prima facie and substantial* case, he will prevail unless his evidence is discredited or rebutted. . . . Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*

H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946) (emphasis added). As noted earlier, the party initiating the case has the general burden of coming forward with a *prima facie* case, *id.*; we now see that this party, if it meets both its burden of production (*prima facie*) and burden of persuasion (where "substantial" is construed as standing for the preponderance standard), it will succeed, unless its evidence is unconvincing. Thus, the party initiating the proceeding, i.e., the proponent of the order for relief (the claimant in the present case), has both elements of the burden of proof. Although the burden of producing evidence may be shifted during the progress of a proceeding from one party to the other, the burden of persuasion remains with the proponent of the order for relief, and it cannot be shifted on the issues raised by the proponent.

There is yet a second reason why our holding today is fully consistent with *Transportation Management*: The issue in that case, in contrast to the one *sub judice*, was whether it was permissible under the APA to place the burden of persuasion for an *affirmative defense* upon the employer.

Under the National Labor Relations Act (NLRA), the General Counsel bears the burden of proving by a preponderance of the evidence that antiunion animus contributed to the employer's decision to discharge an employee. *Transportation Management*, 462 U.S. at 397-99; 29 U.S.C. § 160(c). The Board has held that, regardless of whether the General Counsel carries its burden with respect to the underlying claim, the employer can avoid the conclusion that it violated the NLRA by proving by a preponderance of the evidence that the employee would have been discharged for permissible reasons regardless of his involvement in protected union activities. *See, e.g., Transportation Management*, 462 U.S. at 401.

The Court of Appeals for the First Circuit held it to be error for the Board to place the burden on the employer to prove that the discharge would have occurred notwithstanding the presence of the forbidden motive. The court reasoned that the General Counsel, as the proponent of the order, had to carry the burden of persuasion both on the underlying claim and on the affirmative defense. The Supreme Court reversed, stating that the General Counsel, as proponent of the order, bears the burden of persuasion with regard to the underlying violation, but that the Board may place the burden of persuasion regarding an affirmative defense upon the employer. *Transportation Management*, 462 U.S. at 404.

The facts of *Transportation Management*, therefore, confine it to the following sequitur: Where an affirmative defense is available to the employer, the NLRB may place the burden of persuasion as to this affirmative defense on the employer under the APA. This, of course, is only *after* the claimant has first carried his or her burden of proving the elements of an unfair labor practice.

In sum, the first sentence of section 7(c) places the burden of production on the proponent of the order or rule,

i.e., the proponent must go forward with evidence or the case will come to an end. The third sentence of that section establishes the standard for the burden of persuasion, i.e., a preponderance of the evidence, and also allocates the burden of persuasion to the claimant as the proponent of the order or rule. A logical exception to that rule exists, however, when an affirmative defense is raised. In that scenario, the claimant bears the burden of production and persuasion on the subject of the litigation; then, only after the claimant has met this burden, does the defense bear the burden of persuasion on the affirmative defense.

Because the case *sub judice* does not involve an affirmative defense, the burden of production and persuasion both rest upon the claimant, Mrs. Santoro.

Moreover, as discussed exhaustively in *Greenwich Collieries*, slip op. at 15-17, the true doubt rule impermissibly allows a claimant to prevail despite having failed to sustain his burden of persuasion by a preponderance of the evidence. Therefore, the claimant here is required to prove by a preponderance of the evidence that she was entitled to benefits under the Act. The ALJ found that the evidence was in equipoise, which, by definition, means that the claimant did not carry her burden of proof by a preponderance of the evidence. The finding in her favor, therefore, was error.

Although we agree that a compensatory statute such as the Act should be construed liberally in favor of the claimant, *see Pillsbury v. United Eng'g Co.*, 342 U.S. 197 (1952), Congress has written certain presumptions into its compensatory statutes which are quite favorable to the claimant. As we recently stated in *Greenwich Collieries*, we believe that these presumptions effectuate the statute's liberal purpose, and the APA simply does not allow us to grant the liberal construction urged by Mrs. Santoro. Although we recognize that the Act should be construed liberally, that does not empower us to rewrite the provisions of the Act, which require the claimant to prove the material allegations of the complaint. *Greenwich Collieries*, slip op. at 13.

Finally, we address the cases which have upheld the true doubt rule, *see* typescript p.5, and express our reasons for

rejecting them. Most of these opinions that have upheld the true doubt rule, with the exception of *Freeman*, have not seriously grappled with the complications which arise as a result of the APA. *See, e.g., Avondale Shipyards*, 914 F.2d 88; *Burris*, 59 F.2d 1042; *Parsons*, 619 F.2d 38; *White*, 584 F.2d 569. We do not see how the provisions of the APA may be disregarded. The APA is the polestar which guides our course and is the fundament upon which we strike down the ALJ's use of the true doubt rule in this case.

For example, the Fifth Circuit, in upholding the true doubt rule, has observed, "In effect, the [true doubt rule] eases the ordinary preponderance of the evidence standard applicable in most civil suits." *Avondale Shipyards*, 914 F.2d at 90-91. However, as discussed above, the APA does not allow such an arbitrary alleviation of the claimant's burden of proof, a point which that court did not consider.

In *Freeman United Coal Mining Co. v. OWCP*, 1992 U.S. App. LEXIS 4093 (7th Cir. Mar. 4, 1993), the issue was whether the claimant had proven that he suffered from pneumoconiosis. The *Freeman* court itself noted that the Supreme Court has decided in this context that the X ray produced by the claimant may not merely "constitute evidence" of pneumoconiosis, but must show the presence of pneumoconiosis by a preponderance of the evidence. *Mullins Coal Co. v. Director, OWCP, U.S. Dep't of Labor*, 484 U.S. 135, 138, 147-52 (1987); *Freeman*, LEXIS 4093, at *8-9.

The *Freeman* court went on to uphold the ALJ's use of the true doubt rule in that case, holding that the rule is consistent with the APA. We believe, however, that this conclusion cannot follow. If a claimant must produce an X ray to prove the presence of pneumoconiosis by a preponderance of the evidence, then use of the true doubt rule is improper because it allows the claimant to prevail despite having failed to meet this burden. *See Greenwich Collieries*, slip op. at 15-17

III. CONCLUSION

In sum, we hold that the APA prohibits application of the true doubt rule to cases involving benefits under the

Harbor Workers and Longshoremen Act because: (1) under the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence; and (2) the true doubt rule allows a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. This contravenes the APA. Because there is no express provision in the Act which overrides the APA, the claimant must prove that her husband's death was related to his work injury by a preponderance of the evidence.

It is not clear, however, if the ALJ in this case ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard. It is possible that, upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated.

Accordingly, the order of the Benefits Review Board will be vacated with directions to remand the case to the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Maher must prevail.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

U.S. Department of Labor

Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB No. 89-443 NOT PUBLISHED

PASQUALINA SANTORO (Widow of MICHAEL SANTORO)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	MAR 27 1992
MAHER TERMINALS CORPORATION	)	DECISION AND ORDER
Self-Insured Employer-Petitioner	)	

Appeal of the Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney and Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Joseph T. Stearns (Kenny & Stearns), New York, New York, for self-insured employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration (87-LHC-833) of Administrative Law Judge Aaron Silverman on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 23, 1985, decedent was working for employer driving a car off a cargo ship when a loose shackle swung towards the windshield. In an attempt to avoid the collision, decedent threw his body to the right, allegedly resulting in a "whiplash" movement. Decedent was treated the next day by Dr. Visconti, an osteopath, who diagnosed a strain of the right and left trapezius muscles. Dr. Visconti released decedent to return to work on July 31, 1985, but anticipated follow-up appointments for one to two weeks. Decedent apparently returned to work on August 1, 1985 and worked for one and one-half days.

On August 3, 1985, decedent and his widow (claimant) began a long-scheduled vacation which Dr. Visconti approved. Decedent interrupted his vacation to be examined by employer's consultant, Dr. Greifinger, on August 9, 1985. Dr. Greifinger indicated that subsequent to the July 23, 1985 accident, decedent had complained of neck pain, which radiated into both shoulder and numbness into all the digits of the left lower extremity.[1] Dr. Greifinger diagnosed cervical strain on a preexisting spondylosis. Decedent returned to his vacation, but on August 14, 1985 he telephoned Dr. Visconti complaining of increasing neck and shoulder pain, as well as new pain in his left arm. Dr. Visconti, suspecting possible cardiac problems, advised decedent to go

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[1] Dr. Greifinger mistakenly refers to the numbness as occurring in the digits of the left upper extremity.

to the hospital. Claimant testified that decedent's heart examination at St. Mary's Hospital was negative and that the examining physicians, relating decedent's trouble to his neck, supplied him with a neck brace and medication.

On August 15, 1985, decedent complained of being unable to get out of bed, nausea, and complete numbness in his left arm and was taken by ambulance to Point Pleasant Hospital, where he was examined by Dr. Weinstein, a neurosurgeon. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord from C3 to T1 and an irregularity of the root at C7 or T1 on the left side. Dr. Weinstein's impressions were cervical thoracic root avulsion and cervical thoracic myelopathy.

Dr. Yazdan, a neurosurgeon, also examined decedent. After reviewing x-rays, a CT Scan, and a myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis and a widening of the shadow of the cord at C3 to C4 and below suggestive of an intramedullary tumor or cyst within the cord and recommended immediate surgery. When Dr. Yazdan operated on decedent, a tumor was found which was later diagnosed as astrocytoma, a very rare form of nerve cell cancer. Following surgery, decedent became paraplegic and mute. On March 11, 1986 decedent died, and his certificate of death lists "cardiac arrest" as the "immediate cause" of death, which was a consequence of decedent's cervical astrocytoma. Claimant sought compensation under the Act, contending that the July 23, 1985 work injury aggravated decedent's pre-existing astrocytoma resulting in his disability and death.

In his Decision, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption to link decedent's death and disability to his work injury. The administrative law judge further determined that employer had introduced evidence sufficient to rebut the presumed causal connection between decedent's condition and his employment and accordingly proceeded to weigh the record evidence regarding causation as a whole. After weighing the evidence and finding it to be in equipoise, the administrative law judge applied the statutory policy that

all doubtful questions of fact are to be resolved in favor of the injured employee, *see Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969), and found, based on Dr. Yazdan's opinion, that decedent's death and disability were causally related to the work injury.

The administrative law judge denied employer's Petition for Reconsideration, noting that, as the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A,) and the Board's decision in *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981) (Miller, J., dissenting), no further consideration was necessary.

Employer appeals the award of benefits challenging the validity of the true doubt rule and arguing that the evidence of record as a whole fails to provide any basis for an award of benefits. Claimant responds, seeking affirmance.[2]

Employer's attack on the validity of the "true doubt" rule is premised on the theory that application of the rule violates the United States Supreme Court's holding in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), that the Section 20(a) presumption does not constitute affirmative evidence. Employer argues that once the Section 20(a) presumption is rebutted, the administrative law judge must then determine whether claimant succeeded in establishing causation by a preponderance of the evidence as any other rule would relieve claimant of the burden of proving coverage thereby obliterating any meaningful distinction between the Act as a compensation scheme and the Act as an insurance program.

Employer's argument regarding the applicability of the true doubt rule is rejected. Although *Del Vecchio* holds that once the Section 20(a) presumption is rebutted, it falls out of the

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[2] Employer filed a motion to expedite. Claimant opposed this motion contending that it was not actually a motion to expedite but an untimely reply brief. Employer's motion to expedite is moot. Because employer's motion contains substantive arguments, however, we accept it and the responses thereto as supplemental briefs pursuant to 20 C.F.R. §802.217.

case and does not constitute affirmative evidence, *Del Vecchio* is in no way inconsistent with application of the true doubt rule. Under *Del Vecchio*, once the presumption is rebutted and falls out of the case, the administrative law judge must then determine causation by weighing the evidence as a whole without regard to the presumption. It is at this point that the true doubt rule comes into play. This rule requires that if after weighing the conflicting evidence any doubt remains as to how an issue is to be resolved, the doubt is to be resolved in favor of the injured employee because the intent of the statute is to place the burden on those best able to bear it. *Young & Co. v. Shea, supra.* As the true doubt rule is well established in cases under the Act and employer has failed to raise any persuasive arguments attacking its validity, we decline to depart from it. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). Moreover, as it is well-established that a "preponderance of the evidence" standard is not applicable in proceedings under the Act, we also reject employer's argument in this regard. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *see generally NLRB v. Universal Camera Corp.*, 240 U.S. 474 (1951); 33 U.S.C. §921(b)(3).

Having determined that the administrative law judge did not apply an erroneous standard in analyzing causation under the Act, we narrow our inquiry to whether the administrative law judge properly evaluated the evidence under the applicable standard. In the instant case, as claimant established a harm, a neck injury, and it was undisputed that the July 23, 1985 work accident occurred, the administrative law judge properly found that claimant was entitled to the Section 20(a) presumption. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The administrative law judge also properly noted that Dr. Yazdan's opinion provided evidentiary support for claimant's assertion that decedent's disability and death were work-related. Dr. Yazdan opined that decedent's spinal cord tumor was slow-growing and dormant prior to the work injury but became symptomatic when the work accident produced edema around the parenchymal (outer) covering of the tumor and that pressure from

the swelling of the tumor within the spinal cord led to decedent's gradual neurological problems and death. The administrative law judge also properly found Dr. Derby's opinion that decedent's disability and death were due to the inevitable progression of the underlying tumor without reference to any external event sufficient to establish rebuttal of Section 20(a). *See generally James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Finding rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. After thoroughly discussing and weighing the evidence of record, the administrative law judge found that, despite his sometimes inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that the accident precipitated decedent's disability and death. He noted also that the record establishes an unbroken chain of events supporting a finding of causally-related neck pain and that the alternative offered by employer based on Dr. Derby was that the abrupt escalation of the astrocytoma following the accident was purely fortuitous. The administrative law judge stated that on this record, acceptance of employer's position would be inconsistent with the purposes and policy of the Act. Concluding that the issue of causation remained debatable, the administrative law judge resolved all doubt in favor of the claimant. Accordingly, the administrative law judge found decedent's disability and death related to the work accident.

On appeal, employer contends that Dr. Yazdan's opinion does not provide substantial evidence to support the administrative law judge's causation determination because he wrongfully presumed that decedent had injured his neck in the work accident and his surgical findings and description of the morphology of decedent's tumor are inconsistent with his edema thoery. Employer in addition asserts that medical science has not embraced the theory that astrocytomas may be caused or aggravated by trauma.

All of employer's arguments regarding the credibility of Dr. Yazdan's opinion were considered below and rejected in turn. The administrative law judge issued a comprehensive opinion,

addressing all the evidence in compliance with the rule that where an employment injury aggravates, accelerates or combines with a pre-existing condition, the entire resulting disability or death is compensable, *see Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), as well as the true doubt rule. The administrative law judge found that in spite of the alleged inconsistencies in his testimony, Dr. Yazdan's opinion remained credible because he never waivered from his basic position that decedent's neck pain, neurological deficit and death were traceable to decedent's job-related injury. Although he also found certain elements of Dr. Derby's contrary opinion persuasive, he found that the evidence as a whole regarding causation was debatable and properly determined that under such circumstances the true doubt rule was applicable. Because employer has failed to establish that the administrative law judge's crediting of Dr. Yazdan's opinion is inherently incredible or patently unreasonable, we affirm this determination. *See generally Calbeck v. Strachan Shipping Co.*, 1306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 185 (1991). Under the aggravation rule, the hastening or acceleration of death or disability is compensable. *See Independent Stevedore Co.*, 357 F.2d at 812; *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, J., dissenting). In this regard, Dr. Yazdan opined that decedent's underlying astrocytoma may not have become symptomatic for another 20 years but for the work-related injury and related his disability and death to edematous pressure around the tumor resulting from this injury. We conclude that Dr. Yazdan's opinion provides substantial evidence to support the administrative law judge's determination that decedent's death and disability are related to his work injury. As the administrative law judge did not err in relying on this opinion and the true doubt rule, his award of disability and death benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration are affirmed.

SO ORDERED.

/s/Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/R P S
ROY P. SMITH
Administrative Appeals Judge

/s/Reno E. Bonfanti
RENO E. BONFANTI
Administrative Law Judge

CERTIFICATE OF SERVICE

BRB No. 89-0443: Pasqualina Santoro (Widow of Michael Santoro) v. Maher Terminals, Inc. (Case No. 87-LHCA-0833) (OWCP No. 02-0088978)

I certify that this Decision and Order was sent this day to:

MAR 27 1992 /s/Chiu T. Williams Jr.

(DATE) Lisa L. Lanrman, Executive Counsel
Clerk of the Board

Angelo C. Gucciardo, Esq. Certified
Israel, Adler, Ronca and Gucciardo
160 Broadway
New York, NY 10038

Mr. Pasqualina Santoro Certified
207 Dood Street
Weehawken, NJ 07087

Joseph T. Stearns, Esq. Certified
Kenny, Stearns & Broderick
26 Broadway
New York, NY 10004

Ms. Carol A. DeDeo, Esq. Certified
Associate Solicitor
U.S. Department of Labor
Suite N-4635
200 Constitution Avenue, N.W.
Washington, DC 20210

Mr. Richard V. Robilotti
District Director
OWCP-Longshore Division
201 Varick Street
New York, NY 10014

Judge Aaron Silverman
U.S. Department of Labor
Suite 400, North
800 K Street, N.W.
Washington, DC 20001

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
MICHAEL SANTORO (DECEASED)		Case No. :
PASQUALINA SANTORO (WIDOW)	:	87-LHC-833
v.	:	OWCP No.: 2-88978
MAHER TERMINALS CORP.,	:	

Self-Insured Employer

DECISION AND ORDER — AWARD OF BENEFITS

Proceeding for temporary total disability and death benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).

Issues

1. Whether the Claimant was entitled to compensation for temporary total disability after August 2, 1985, the last day he worked, to March 11, 1986, when he died.

2. Whether the Claimant's death was causally related to a July 23, 1985 work-injury which is claimed to have aggravated an underlying cervical astrocytoma.

Statement of the Case

Michael Santoro, hereinafter, the Claimant, who died March 11, 1986, had been employed as a longshoreman by Maher Terminals, Inc. (Employer) at Port Elizabeth, New Jersey. On July 23, 1985, he was driving a car off a cargo ship when a loose shackle swung towards it. (Tr. 16). Fearing that the shackle would break through the windshield, he threw his body to the right, presumably below windshield level. Mrs. Santoro testified

at the formal hearing held on March 30 and 31, 1988, that, in describing to her his reaction to avoid the oncoming shackle, he "turned the car and doing so snapped the back of his neck and he fell to the seat of the car and the shackle went through the windshield anyway." (Tr. 215). The parties dispute whether his action to avoid the shackle resulted in an actual "whiplash" movement. (Tr. 78-94). At the time of the accident he was 62 years old.

According to Dr. William A. Visconti, Jr.'s report, the accident occurred at 1:30 p.m. on July 23, 1985, and he first treated the Claimant the next day. Dr. Visconti, a D.O., reported that the Claimant told him that he injured his back, and described the circumstances of the accident. He diagnosed strain of the right and left trapezius muscles, and recommended ultrasound therapy and parafon forte tablets. He deemed the Claimant able to return to work on July 31, 1985, but indicated that follow-up treatment should be pursued for one to two weeks more. Mrs. Santoro testified that the Claimant worked a full eight hours on August 1, 1985, but, because of pain in the back of his neck and across his shoulders, he was only able to work approximately 1/2 day on August 2. (Tr. 218-219). However, an NYSA-ILA work printout and an affidavit of the corporate secretary of Maher Terminals, Inc., indicated that the Claimant returned to work for four hours on August 1, 1985, and last worked eight hours on August 2, 1985. (EX-A). The Claimant was paid compensation for temporary total disability for the period preceding his return to work, from July 23, 1985, through July 30, 1985.[1]

On August 3, the Claimant and his wife began a long-scheduled vacation at the Jersey shore. She testified that because of continued pain in the back of his neck and shoulders he telephoned Dr. Visconti prior to their departure to see about going on vacation. Dr. Visconti allegedly advised him to go, taking advantage of the sun and rest. (Tr. 220). Owing to increased

[1] There is nothing in the record to show whether the Claimant worked on July 31, and if not, why not.

pain in her husband's neck and shoulders, she telephoned Dr. Visconti again the next day for further medical advice. (Tr. 221) Dr. Visconti advised continued rest and sunshine. (Tr. 222).

In the interim, the Claimant received a letter from the Employer informing him to consult Dr. David J. Greifinger. Mrs. Santoro testified that, although her husband was inclined initially to postpone this consultation until after their vacation, he was by that time experiencing numbness in the fingers of his left hand, in addition to shoulder and neck pain. (Tr. 222). Dr. Greifinger, an orthopedic surgeon, examined the Claimant on August 9, and submitted a report indicating that subsequent to the July 23, 1985 accident, the Claimant "developed pain about the neck which he describes as radiating into both shoulders." (CX-33). The report noted that the Claimant also described numbness into all of the digits of the left upper extremity, a finding of "recent times." After physical and x-ray examinations, Dr. Greifinger diagnosed cervical strain on a preexisting spondylosis. He advised the Claimant to continue applying heat and to take aspirin.

The Claimant returned to the shore that same day, but on August 14 telephoned Dr. Visconti again complaining of increasing neck and shoulder pain, as well as a new development — left arm pain. Suspecting possible cardiac involvement because of the Claimant's prior history and his left arm pain, Dr. Visconti suggested that he go to the hospital for a heart check. The heart examination at St. Mary's Hospital in Hoboken, New Jersey, was negative. However, Mrs. Santoro testified that the examining physicians said that his trouble was in the neck and supplied him with a neck brace and medication. (Tr. 227, 228). When the medication failed to alleviate the pain, the Claimant called an ambulance on August 15 to take him and his wife to a nearby hospital. Mrs. Santoro testified that he was unable to drive since he got up that morning unable to get out of bed, complaining that he wanted to vomit, and experiencing complete numbness of his left arm, and that she can't drive. (Tr. 229).

He was admitted to emergency services of the Point Pleasant Hospital in Point Pleasant, N.J. at 9:39 p.m., where the admission form indicated among other things that he said "an accident four weeks ago [and] injured his neck." Dr. S. Weinstein, a neurosurgeon, was one of the first of several physicians to examine the Claimant. According to his report, he received a history from the Claimant that, subsequent to the accident at work, "he suffered immediate onset of pain across the lower trapezii, bilaterally, and the lower neck." The Claimant also related to him the evolution of his symptoms and complaints up to his admission to Point Pleasant Hospital. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord throughout C3 to T1 and an irregularity of the root at C7 or T1 on the left side. He diagnosed cervical thoracic root avulsion and cervical thoracic myelopathy and recommended further testing and consultation. (CX-1).

Dr. Yazdan, a neurosurgeon, examined the Claimant next. In a report dated August 18, 1985, Dr. Yazdan noted that the Claimant's history "goes back to a recent work-related accident that he had during which he sustained a neck injury." (CX-2). After his review of x-rays, a CT scan, and the myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis, a widening of the shadow of the cord at C3 level down to C4 and further down, which raised the possibility of an intramedullary tumor or a cystic formation within the cord and he recommended immediate surgery. (CX-6). He operated on the Claimant and found a tumor in the spinal cord identified as an astrocytoma.

The Claimant remained a patient at Point Pleasant Hospital until transferred to the Veterans Administration Hospital in East Orange, New Jersey, where he remained a paraplegic and mute until he died on March 11, 1986. The certificate of death (CX-4) lists "cardiac arrest" as the "immediate cause," which was said to have been "a consequence of [deceased's] cervical astrocytoma."

Mrs. Santoro contends that her husband's astrocytoma was aggravated by the July 23, 1985 work-related injury, and hastened his death.

Findings and Conclusions

I .

The Employer paid compensation for temporary total disability from July 23 to July 31, 1985, when Dr. Visconti advised that the Claimant could return to work. However, it contests any causal connection between the July 23 injury and disability from August 1, 1985, to the date of the Claimant's death and between the injury and his death.

Under section 20(a) of the Act, it is presumed, in the absence of evidence to the contrary, that a claim comes within the provisions of the Act. The Claimant, however, has the burden of showing the nature and extent of his injury. *Brocato v. Universal Maritime Service Corp.*, 9 BRBS 1073 (1978).

The section 20(a) presumption applies to the issue of whether an injury is causally related to employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976). Before section 20(a) is applicable, a Claimant must establish that he or she sustained some harm, and that working conditions existed or that an accident occurred that could have caused the harm. *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981). Once a Claimant establishes these two elements of his or her *prima facie* case, then the section 20(a) presumption applies to link the harm with the employee's employment. *Lacy v. Four Corners Pipeline*, 17 BRBS 139 (1985). Application of the section 20(a) presumption then shifts the burden to the employer to come forward with substantial evidence countering the presumed relationship between the employee's injury or resultant condition and the work environment. *See Swinton, supra; Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981).

The Claimant sustained a work injury on July 23, 1985. On demonstrating an injury and circumstances at work which could

have caused the alleged injury, the section 20(a) presumption of causation is properly invoked. *Kelaita v. Triple A. Machine Shop, supra.* To overcome the presumption, the Employer must introduce "substantial evidence to the contrary," which the courts have interpreted as evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). If the Employer is successful, the section 20(a) presumption no longer controls, and the issue of causation is resolved on the whole body of evidence. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

In a short note dated October 10, 1985, Dr. Yazdan wrote that the Claimant was totally disabled and his condition was related to the neck injury he sustained at work. (CX-5). In an Attending Physician's Report dated October 21, 1985, Dr. Weinstein set forth his diagnosis of cervical thoracic root avulsion and cervical thoracic myelopathy indicating that the condition was due to the work-related injury. In a letter dated October 31, 1985, Dr. Yazdan set forth a diagnosis of cervical myelopathy secondary to post traumatic spondylotic and neoplastic disorder of the cervical cord and concluded that the work-related injury precipitated his condition causing total disability.

At the formal hearing, Dr. Yazdan testified that the Claimant's tumor in his spinal cord was dormant and asymptomatic until his accident at work. In addition to spraining and straining the neck muscles and ligaments around the spondylotic spine and nerve root, the trauma of the whiplash caused an initial swelling (edema) around the parenchymatous (the tissue around the tumor). Then, the constant rubbing of the swollen spinal cord against the vertebral canal owing to the Claimant's ordinary regular movement of his head gradually increased the swelling. The swelling caused the pressure that triggered his symptoms, led to his neurological breakdown, and hastened his death.

In rebuttal of the presumption and Dr. Yazdan's opinion on causal relation, the Employer presented the testimony of Dr. Bennett W. Derby, a diplomate in pathology and neurology and,

among other impressive professional credentials and assignments, long affiliated with the University Hospoital, New York Medical School. Although he had never examined the Claimant, he had carefully reviewed all of his pertinent medical records. According to Dr. Derby, the evidence failed to establish a whiplash or neck injury; if there was such an injury, the Claimant would have experienced immediate pain and neurological collapse "on the spot;" Dr. Yazdan's explanation involving edema is "medically impossible;" and the Claimant's disability and death were due to the inevitable progression of the underlying tumor "without reference to any external event."

Therefore, the Employer, having indicated another cause for, and having severed the possible connection between the Claimant's total disability and death, the presumption is deemed overcome and the case is decided on the basis of the record as a whole.

II

The Employer argues that the integrity of Dr. Yazdan's analysis must depend on two things: (1) the occurrence of immediate and excruciating pain at the moment the Claimant's spinal cord contacted the vertebral canal as a result of the work-related accident, and (2) the presence, in fact, of edema gradually increasing and causing the pressure leading to the Claimant's neurological collapse. These depend on the assessment of Dr. Yazdan's candor and the reasonableness of the inferences that can be drawn on the basis of all the available information. Further, Dr. Yazdan's candor should be assessed on the basis of the consistency of the opinions he expressed or by his ignorance of the complete medical record.

It submits that inconsistency in Dr. Yazdan's opinion can easily be demonstrated by his differing expressions on the nature of the injury the Claimant sustained, the severity of the trauma or pain experienced, the appearance of the spinal cord, the presence of edema in the cord, and the characteristics of the astrocytoma.

Accordingly, it contends that Dr. Yazdan's opinion on causal connection between the Claimant's accident and his disability and death should not be preferred over that of Dr. Derby who had reviewed all the medical records whereas Dr. Yazdan had not seen the reports of Dr. Visconti and Dr. Greifinger in which the Claimant's history and complaints differed from Dr. Yazdan's consultation report.

III

A material issue in this case is whether the Claimant experienced neck pains which persisted from the time of the July 23, 1985 accident to the time Dr. Yazdan examined him.

The Employer argues that there is no valid medical evidence in the record to support Dr. Yazdan's statement in his consultation report that the Claimant's history went "back to a recent work-related accident during which he sustained a neck injury." It argues that Dr. Visconti's report fails to show that the Claimant sustained a whiplash or any other type of neck injury or that the Claimant complained of neck pain or any condition that would have prompted Dr. Visconti to take an x-ray. Since Dr. Visconti diagnosed bilateral trapezius strain on the basis of subjective complaints and palpation of the area, any inferences of neck pain through trauma and contact of the spinal cord with the vertebral canal are obviated. It contends further that the Claimant's complaints of neck pain to Dr. Greifinger were "new" complaints, appearing but a few days before Dr. Greifinger's examination on August 9, 1985.

Dr. Greifinger's medical report reveals that left arm numbness and not the Claimant's neck pain was of "recent origin." Dr. Greifinger noted:

> ...The Patient stated that he hit something which then came up and hit the windshield of the vehicle. *He developed pain about the neck* which he describes as radiating into both shoulders. He has also described numbness into all of the digits of the left upper extremity. This latter finding has been in *recent* times.

(EX-4; emphasis added). Two other references in this report make no mention that the neck pains were of recent origin. However, on examination Dr. Greifinger found "Motions of the cervical spine were restricted with a complaint of pain in virtually all postures." (C-4). Regarding Dr. Greifinger's findings, the Employer refers to Dr. Derby who testified that he could not agree with Dr. Greifinger's diagnosis of a cervical strain on a pre-existing spondylosis because there are no findings of muscular symptoms necessary to support that diagnosis.

It is concluded that the weight of the evidence is sufficient to support a finding that, as Dr. Yazdan testified, the Claimant complained of neck pain "all along." The record shows that the Claimant gave a history of neck pain starting with the accident to all the physicians who examined him after Dr. Visconti. It would be unreasonable to infer that under the circumstances the Claimant, who was so fearful about what was wrong with him, would deliberately lie about the history of his pain to a doctor from whom he would be seeking relief. Secondly, since he did not know what was wrong and had no reason to believe the condition could be due to something other than his most recent disability for which the Employer had already assumed liability, there is little reason to believe the history he gave to the examining physicians was motivated by a quest for secondary gain. Thirdly, in agreement with Dr. Yazdan, Dr. Derby testified that spinal cord astrocytomas are "very very rare" tumors and "if a guy walks into your office you do not think of cervical astrocytoma." He explained that with Dr. Greifinger's findings of neurological symptoms in the Claimant's left arm the diagnosis cannot be muscular or a sprain. It must be the spinal cord. If, as Dr. Derby believes, that Dr. Greifinger misdiagnosed a muscular problem even partially based presumably on the Claimant's complaints with the neurological symptoms evident then the value of Dr. Visconti's simple diagnosis of muscular strain before such tell-tale symptoms appeared has to be regarded with considerable reservation. Lastly, Mrs. Santoro, who was determined to be a credible witness testified that the Claimant complained of neck pain from the very beginning.

IV

The basic issue, then, is whether the Claimant's disability and death, as well as his neck pains, were causally related to trauma on July 23, 1985, or solely a result of the spontaneous eruption and natural progression of his astrocytoma.

Dr. Yazdan testified that astrocytomas are extremely rare in the spinal cord. They are generally slow-growing and can be present for many years before a patient becomes symptomatic. He testified that a tumor "leathery" in texture, in contrast to a softer or "mushy" one, generally grows more slowly and is less infiltrating and malignant. He testified that upon reaching the tumor within the spinal cord during the myelotomy, he found that "it appeared to be slightly fluctuant, very firm and leathery in consistency..." (Tr. 39). According to Dr. Yazdan, with Dr. Derby in general agreement, whether a tumor like an astrocytoma is rapid growing or aggressive can be confirmed on the basis of an observation or analysis of it being leathery or mushy.

Although Dr. Derby conceded that tough leathery-type tumors are slow-growing, he indicated and the Employer agreed that Dr. Yazdan's testimony concerning whether the tumor's prominent feature, the mushroom deformity at C3-C4, was thin and fluctuant or firm and leathery was inconsistent with his August 19, 1985 operative report, as well as, his testimony on cross-examination.

Notwithstanding vigorous cross-examination on his different descriptions of the tumor's morphology, in the final analysis, Dr. Yazdan firmly maintained that the mushroom portion was quite hard and denied that because parts of the tumor were fluctuant, they were mushy. In evaluating his overall testimony against this particular charge of inconsistency, note is taken of his October 31, 1985 letter to an attorney in which he wrote, "The tumor had a very rough and leathery-like consistency...." (C-6) That was over a year before the claim for benefits was filed in this matter in November 1986, and it is reasonable to assume apparently long before he could have anticipated the

test he would undergo at the hearing concerning his conflicting testimony.

Although subject to call as conjecture, note is also taken of the possibility, with some foundation in the record, that owing to a communication gap the use of the word "fluctuant" by Dr. Yazdan received a meaning he did not intend or expected it to convey. His testimony at page 183 of the transcript leads to that impression:

> Q Okay, you found, at least in areas of this tumor, did you not, that the tumor was fluctuant.
>
> A *It appears fluctuant* –
>
> Q On the –
>
> A – by touching – by touching it, you see?
>
> Q Okay.
>
> A However, when we punctured it, because anytime there's a fluctuation, you got a puncture, you do less damage to the cord than if you can evacuate the cyst.
>
> So the whole purpose of this whole thing is to be able to save as much of the cord as possible. So when we did that, there was no fluid, *then I knew that the fluctuation was just going back and forth of the lesion, under the needle.* (Underlining added).

What Dr. Yazdan seems to be saying is that rather than mushy, as fluctuant can be defined, the mushroom part of the tumor was "pliant" which does not rule out its texture as tough and leathery.

V

The significance to Dr. Yazdan of a slow-growing, leathery-type tumor is that, in his opinion, the Claimant's tumor, but

for the work incident, could have remained dormant for many years. Until the accident, the Claimant was symptom free. The trauma caused the edema which contributed to his disability and death.

The Employer spelled out how Dr. Yazdan contradicted himself on the nature and the severity of the trauma and argued against his "theory" because of his ignorance or uncertainty concerning not only the nature and extent of the injury, but also the site of the injury, in addition to the fact that he never saw or reported evidence of edema.

The Employer contends that Dr. Derby's opinion is entirely consistent with the medical evidence. Dr. Derby testified:

> THE WITNESS: This is my opinion based on the information in the hypothetical question I was just asked in which I asked to assume that neck pain had been present since the day of the accident persistent thereafter into the full evolution with the first appearance of neuorlogical signs a good many days later. I won't repeat the dates, you're familiar with this, a long delay. This is medically impossible. We have a tumor – correction, we have a spinal cord at the cervical level which is shot through with tumor so bad that it's necrotic.
>
> Although the spinal cord tumor itself shows minimal widening the cord is further indented by at least one, one report or two, second report, osteophytes pushing in from the vertebral bodies from the front.
>
> BY JUDGE SILVERMAN
>
> Q How long are those osteophytes, what are we talking about, needle point bony spurs?
>
> A They're spurs like coming off the back of rooster's hoof.

Q What are we talking about?

A Bony –

Q In size.

A They're bony protuberances.

Q I understand. What size are we talking about, needle point size?

A No.

Q Pencil point size?

A Pencil point thickness. They come off like a bar and move on a broad front, sometimes more on one side, sometimes more on the other but if in the middle line it indents the cord. So here we have a man whose cervical spinal cord is shot through with tumor which is so aggressive that the spinal cord is necrotic at that level which in addition is compromised by these two osteophyte pencil thickness indentations in a side to side manner, pushing in. If this man had a flexion extension, that is to say whiplash sort of mechanism injury on July 23, 1985 so severe as to have caused pain, back neck pain, he would have had immediate neurological decompensation, and I'm going to spell that out, a flexion extension. I am asked to assume, I do not believe but I am asked to assume a "whiplash" injury, that's a whip like – like you're snapping a whip, that's a bad shake-up, number one; number two, it implies a pretty severe degree of flexion and extension. It would not be medically possible for a man with that kind of injury with the cervical spinal cord shocked [sic] through with a necrotic tumor also being pushed in on by two osteophytes to have not had immediate neurological symptoms and deficit on the spot and if not on the spot within a few minutes.

> It would be medically impossible for that cord in that condition given a violent whiplash to not have decompensated into deficit on the spot, it's not medically possible. (Tr. pp. 286-288).

Further on, Dr. Derby said:

> A Michael Santoro had a naturally occurring astrocytoma centering on the cervical spinal cord which had been there for a long, long time, one portion of which at C3-C4 abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece. The tumor had not caused symptoms all that earlier time to our knowledge because at that point it was infiltrative and in a less aggressive form. It is when it spontaneously broke in and of itself into this more aggressive highly malignant form that the symptoms began and the whole thing was indigenous to the spinal cord without reference to anything else. (Tr. p. 304).

VI

This record presents the unenviable task of resolving the ultimate issue from conflicting probative evidence. It is an arguable case to which the rule that doubt concerning evidentiary conflicts should be resolved in favor of the Claimant is deemed applicable.

Although Dr. Derby's response, above, to the hypothetical question was based on the assumption that neck pain had been present and persisted since the day of the accident, he was most emphatic and convinced, partially on the basis of the reports of Drs. Visconti and Greifinger, that the Claimant never suffered a neck injury.

As mentioned above, there is nothing in Dr. Greifinger's report to support the contention that the Claimant's neck pain was something new which appeared after he was discharged by Dr. Visconti as "cured." Insofar as Dr. Visconti's reports are concerned, they are dismissed as probative evidence of a full medical evaluation of the Claimant's symptoms and overall condition and are looked upon as no more than a perfunctory billing for office visits. Any reliance on them in formulating an argument or opinions is believed to be of little value.

Other than that, Dr. Derby's testimony provided a high level of persuasion and there is some merit in the Employer's position, taking into account the differences it pointed to in Dr. Yazdan's testimony that, in effect, Dr. Yazdan's opinion is a gratuitous "theory" to put the Claimant's case in the best light.

However, there is no doubt that the Claimant had an accident and although there is no reliable evidence to determine whether the Claimant actually sustained a violent whiplash injury, there is also no evidence as to what really happened in the accident, but it is found that something did happen and that as a result the Claimant sustained some type of traumatic insult to or around his neck of which he complained of pain from the very beginning which Dr. Yazdan believed and relied on for his opinion on causal connection. That opinion is anchored in his experience as a hands-on neurosurgeon.

In his direct testimony, Dr. Yazdan likened the Claimant's slow-growing tumor to the existence of an underlying degenerative disease:

> "We have two conditions in this gentleman which existed, most likely, prior to this accident. One was a slight degree of osteoarthritis or spondylosis, which is quite common. You have it, I have it, everybody over 35 or 40 has a little bit of it. We live with it for many, many years, 20 or 30 years. Nothing happens until something happens, either accident or a fall or a whiplash, or whatever you want to call it. Then the

individual becomes symptomatic, then he comes to us, then we take the X-ray, then we naturally don't see anything except a slight degree of osteoarthritis and then, we tell the patient: 'Yes, you do have some arthritis.' And immediately, he says: 'Well, I have no problem.' He get very, very upset. He says: 'I only have problem since I have this accident. How can you tell me I have this problem before?' And this is a very common problem we get in the office and in the hospital and also it's a leg – legal problem."

"The answer is very simple, that you have a dormant problem which may be spondylosis or anything else and it's silent, at least in that particular moment, in time. Then something happens which aggravates the tissues in or around that region that you are talking about.

(pause)

When that happens, the area becomes swollen and inflamed. If we think just a simple sprain and a strain, these patients are symptomatic sometimes more than even a year, they get headache and neck pain, it leads to chronic myocytis and it started with a sprain or a strain to begin with. Sometimes, they get a pain down the arm if they have a spondylosis associated with it.

"Now, in this gentleman, we had additional dormant problem which was this tumor within the cord, that this was an active man, he was doing very, very had work, I understand, and he was completely asymptomatic until this thing happened, until this accident. The trauma of the whiplash, acceleration and deceleration, did cause swelling around the parenchymatous or the tissue around the tumor, in addition of spraining and straining the neck and the ligaments around this spondylotic spine and the nerve root.

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in – go back to astrocytoma, this tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation."

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(Tr. pp. 48-50).

When pressed on cross-examination concerning his opinion and whether the tumor activated by itself, he responded:

> Yes, it is possible if we assume this is the only case in the literature, but having seen the behavior of these tumors and having seen many, many dormant problems in the patients who become – many all – they all manifest themselves after the trauma or become symptomatic, makes an expert or anybody who has got some experience, think that yes, there is a correlation between the precipitation of the symptoms and trauma.
>
> *If this was the only case in literature, I would go along with you, but that's not the case. We do see this quite often.* (Underlining added). Not necessarily with the spine – astrocytomas of the cord. I get a patient comes with a concussion of the brain, I do a CAT scan, there's a meningioma. Now all of a sudden, this patient is symptomatic. Sure we know that the concussion didn't cause the meningioma, but definitely, the concussion caused some edema around the tumor, which made the patient symptomatic. So how can you say there's no relationship? (Tr. pp. 173-174).

Although Dr. Yazdan admitted that he did not see edema during surgery or mention it in his operative report, he explained that edema is not something one sees under a microscope as he used in the operation. Dr. Derby conceded that edema does accompany a tumor, at least some of the time (Tr. p. 354), but edema never causes anything (Tr. p. 337). However, his view [without more personal enlightenment and perhaps a better understanding here] does not square with the impression of Dr. Friedman who examined the Claimant August 20, the day before surgery. Of relevance and significance is that part where he says "At this point it appears that both of his intercostal and phrenic nerves *are affected*, possibly just by edema or perhaps this is permanent ...' (underlining added).

That the nerves can be affected by edema, according to Dr. Friedman, or that the function of the nerves may be reacting to the effect of edema on them, adds credence to Dr. Yazdan's position.

The type of the Claimant's underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this case. It seems evident or reasonable to acknowledge that the causes and the factors controlling many malignancies are still obscure and under research. Added to that, as this record shows, is the problem that persons invaded by astrocytomas are extremely uncommon. Dr. Derby testified that the disease is not known to medical science to be caused or aggravated by trauma. (Tr. p. 305). However, there is nothing in this record to indicate whether any statistical studies have been done in that area. Further, Dr. Yazdan's position is based primarily on the edema resulting from trauma rather than trauma directly, and death attributed to edema has been diagnosed. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir 1965). The problem is further complicated by the relationship of the disease to the host. As Dr. Yazdan pointed out one can't generalize tissue reaction or responses to trauma. (Tr. p. 130-134)

Despite the inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that there is a history of neck pain traceable to the Claimant's job-related accident which precipitated his subsequent disability and death. The record, for the reasons discussed, has been determined to establish an unbroken chain of events supporting a finding of causally-related neck pain. The alternative is to conclude on the strength of Dr. Derby's expertise that the occurrence of the abrupt escalation of the underlying astrocytoma and the job-related accident was purely fortuitous without any relationship one to the other. In view of this record, acceptance of the Employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

Upon consideration of the record as a whole, it is found and concluded that the Claimant's disability and death is causally related to his accident on July 23, 1985.

ORDER

The Employer shall:

1. Pay compensation to the Claimant's eligible survivors for total disability from August 3, 1985, to March 11, 1986, and death consistent with the applicable provisions of the Act and the regulations.

2. Pay and reimburse those entitled to benefits all medical and other related costs incurred as a result of the Claimant's disability and death as may be required by the applicable provisions of the Act and regulations.

3. Pay all interest and penalties, if any, in accordance with the applicable provisions of the Act and regulations.

/s/Aaron Silverman
AARON SILVERMAN
ADMINISTRATIVE LAW JUDGE

AS/sem

Dated: NOV 22 1988
Washington, DC

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

MICHAEL SANTORO (DECEASED) PASQUALINA SANTORO (WIDOW)	:	CASE NO. 87-LHC-833
Claimant	:	
v.	:	OWCP NO. 2-88978
MAHER TERMINALS, INC.	:	
Employer	:	

RULING DENYING PETITION FOR RECONSIDERATION

By Decision and Order of November 22, 1988, the subject Claimant was awarded disability and death benefits.

On December 9, 1988, the Employer petitioned for reconsideration on the issue whether the rule of doubt was properly applied by the administrative law judge to the facts found.

It is believed that the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedure Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company*, 14 BRBS 805 (1981), and further consideration would serve no useful purpose.

Accordingly, the petition for reconsideration is, hereby, *DENIED.*

/s/Aaron Silverman

AARON SILVERMAN
ADMINISTRATIVE LAW JUDGE

AS/sem

Dated: DEC 15 1988
Washington, DC